314 U.S. 50
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 351

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ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

And Companion Cases.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit, and

SUPPORTING BRIEF.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No.....

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,802; C. C. A. No. 11,816.)

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11802; C. C. A. No. 11,817.)

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,803; C. C. A. No. 11,818.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,804; C. C. A. No. 11,819.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,805; C. C. A. No. 11,820.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,806; C. C. A. No. 11,821.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,806; C. C. A. No. 11,822.)

MELROSE ICE CREAM CORPORATION, a Corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the last Board of Directors and Trustees for the Creditors and Stockholders of Melrose Ice Cream Corporation, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,807; C. C. A. No. 11,823.)

MELROSE ICE CREAM CORPORATION, a Corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the last Board of Directors and Trustees for the Creditors and Stockholders of Melrose Ice Cream Corporation, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,807; C. C. A. No. 11,824.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners.

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,808; C. C. A. No. 11,825.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,809; C. C. A. No. 11,826.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,810; C. C. A. No. 11,827.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,810; C. C. A. No. 11,828.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,811; C. C. A. No. 11,829.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,812; C. C. A. No. 11,830.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,813; C. C. A. No. 11,831.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,813; C. C. A. No. 11,832.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,814; C. C. A. No. 11,833.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,815; C. C. A. No. 11,834.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners.
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,816; C. C. A. No. 11,835.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,816; C. C. A. No. 11,836.)

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, ANHEUSER-BUSCH, INCORPORATED, WILLIAM L. PARKER, Receiver of and for Anheuser-Busch Ice and Cold Storage Company, Incorporated, a corporation formerly existing under the laws of the State of Virginia, MELROSE ICE CREAM CORPORATION, a corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors, and Trustees for the Creditors and Stockholders of said Melrose Ice Cream Corporation, C. D. RUSSELL, Liquidator of Anheuser-Busch Ice Cream and Beverage Company, a corporation formerly existing under the laws of the State of Louisiana, ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, Surviving Members of the Last Board of Directors and Statutory Trustees for the Creditors and Stockholders, of New State Ice Company, a corporation formerly existing under the Laws of

the State of Oklahoma, and SPRINGFIELD ICE AND REFRIGERATING COMPANY, respectfully pray that a Writ of Certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit entered on May 29, 1941 (R. 1161), in each and all of the above-entitled causes, being causes Nos. 11,816 to 11,836, both inclusive, on the docket of said Circuit Court of Appeals, which judgment reversed several judgments for respective petitioners in the aggregate amount of $123,-179.46, entered on March 7, 1940, in and by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, for the refund of federal income taxes for the years 1924, 1925 and 1926, and affirmed certain judgments in favor of the Collector, entered on the same day by said District Court (cf. District Court's Directions for Judgments, R. 587, 590-592).

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347). The judgment of the Circuit Court of Appeals was entered on May 29, 1941 (R. 1161). A petition for rehearing (R. 1169), filed on June 13, 1941, was entertained by said Circuit Court of Appeals and denied on June 23, 1941 (R. 1183).

QUESTIONS PRESENTED.

The petitioner, Anheuser-Busch, Incorporated, had, prior to National Prohibition, developed a nonalcoholic cereal beverage called "Bevo," designed for marketing in dry territories, which attained large-scale production from 1916 to 1918. This product was manufactured by an "arrested fermentation" process, and marketed in odd-shaped

10-ounce bottles, under governmental regulations which did not permit the use of the "de-alcoholizing" process (excepting upon payment of a beer tax) and which required the use of a container plainly distinguishable from the 12-ounce bottle used for the marketing of beer. After 1918 near beer, manufactured by the "de-alcoholizing" process under changed regulations, virtually superseded the product Bevo, and during 1920 and 1921 large supplies of Bevo cases and bottles returning from the trade were accumulated and stored. *During the years 1921 to 1923, both inclusive, such accumulated cases and bottles were reserved for the marketing of new products then being developed. In 1924 it became apparent that the new products were failures.* The surplus cases and bottles were never thereafter used again. They were not readily salable.

The primary questions in the case are:

1. Whether, under the circumstances above stated, taxpayers were entitled to deductions for obsolescence of Bevo cases and bottles in the years 1924 and 1925 under Section 234 (a) (7) of the Revenue Act of 1924.

2. Whether, under the circumstances above stated, taxpayers were entitled to deductions for loss of useful value of Bevo cases and bottles in the years 1924 and 1925 under Section 234 (a) (4) of the Revenue Act of 1924.

Secondary questions, not ruled upon by the Circuit Court of Appeals, would be presented upon sustention of taxpayers' claims to deductions for obsolescence or loss of useful value.

As of June 30, 1925, Anheuser-Busch, Incorporated, a corporation organized in 1875, whose charter was about to expire, transferred all of its assets subject to its liabilities to a new corporation of the same name, which had

been organized by the stockholders of the old corporation. Such stockholders held the same proportionate interests in the new corporation which they had held in the old. The sole purpose of such reincorporation was to continue the business of the old corporation under Missouri Statutes which provided no means for extension of the old charter.

The secondary questions presented under such state of facts are:

3. Whether Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924, so as to enable net losses of the former incurred in 1924 to be offset against income of the latter in the last half of 1925 and in 1926.

4. Whether, if the District Court was in error in holding that said corporations were the "same taxpayer," taxpayers may have enhanced judgments resulting from the treatment of the two corporations as separate taxpayers.

Questions 3 and 4 do not affect all of the judgments rendered by the District Court, but only those which are for the recovery of overpayments for 1925 and 1926 and result from the application of loss carry-overs.

STATUTES AND REGULATIONS INVOLVED.

The statutes here involved are:

Section 234 of the Revenue Act of 1924 (43 Stat. 283), the pertinent portions of which read as follows:

> "Sec. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise. * * *

"(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *"

Section 206 (b) of the Revenue Act of 1924 (43 Stat. 260), which reads as follows:

"Sec. 206 (b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The regulations here involved are:

Article 166 of Regulation 65, reading as follows:

"Obsolescence.—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because,

in the opinion of a taxpayer, the property *may* become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and cannot be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due."

Article 143 of Regulations 65, reading as follows:

"Loss of Useful Value.—When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis and the salvage value of the property. In determining the amount of the loss, adjustment must be made, however, for improvements and for depreciation. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be charged off on the books and fully explained in returns of income."

SUMMARY STATEMENT OF MATTER INVOLVED.

The Facts.

The facts touching upon the primary issues of obsolescence or loss of useful value, as found by the District Court, may be summarized as follows:

The chief business of Anheuser-Busch, Incorporated, prior to the advent of National Prohibition, was the manufacture and sale of beer (R. 577).

Commencing in 1908, Anheuser-Busch, Incorporated, developed a product, Bevo, which was a malt beverage free from alcohol, manufactured by an arrested fermentation process, for the purpose of finding a market for a non-alcoholic beer-like beverage in local-option territories and government reservations (R. 577).

Governmental regulations at that time and until 1916 required that near-beer be made on premises segregated from the premises upon which beer was made, and that it be marketed in packages unlike those ordinarily used for containing fermented liquor. Unless the product was made by a process under which at no time during manufacture more than one-half of 1 per cent of alcohol was contained therein, it was taxed as beer (R. 578).

Bevo was manufactured on a large scale in 1916 and reached peak production in 1918 (R. 578).

For the purpose of marketing Bevo, Anheuser-Busch, Incorporated, during the years 1916 to 1919, both inclusive, acquired 2,899,774 Bevo cases at an aggregate cost of $2,731,332.48, and purchased or manufactured 666,066 gross of Bevo bottles at an aggregate cost of $1,794,023.49. The prices paid for the cases ranged from 85½¢ in 1916 to $1.03 in 1918. The prices for the bottles ranged from $2.40 per gross in 1916 to $3.85 per gross in 1918. The bottle

adopted for the marketing was a 10-ounce bottle of unusual shape, differing materially from the tall 12-ounce bottle used for the marketing of beer. The Bevo cases were built to accommodate the shorter bottles (R. 578).

At the time Bevo sales were made only the liquid content was sold and deposits were taken for the return of the cases and bottles. As empty cases and bottles were returned customers were given refunds at the rate of the deposits charged (R. 579).

Sales of Bevo suffered drastic declines after 1918. From a volume of 10,449,152 dozen bottles in 1918, sales fell to 3,904,316 dozen bottles in 1919. Sales fell again from 3,044,006 dozen bottles in 1920 to 794,378 dozen bottles in 1921 (R. 578).

The immediate cause of the decline of sales of Bevo after 1918 was a change, the effect of which was then being experienced, in governmental regulations under which breweries were thenceforth permitted to produce near-beer by the manufacture of alcoholic beer and its subsequent de-alcoholization, and to market such near-beer in ordinary twelve-ounce beer bottles, the taxability of the near-beer being made to depend upon the alcoholic content at the time it was finished as distinguished from the alcoholic content during the process of manufacture. The quality of such de-alcoholized beer was better than that of Bevo, and competition required Anheuser-Busch, Incorporated, to introduce de-alcoholized Budweiser at the end of 1919 and to market it in beer bottles (R. 578-9). By the end of 1921 the company's officials recognized that the decline in volume of Bevo sales in comparison with sales of preceding years was permanent (R. 616).

Subsequently, during the Prohibition period, sales of

both Bevo and de-alcoholized Budweiser declined due to competition of illegal home-brewing (R. 579).

As a result of Prohibition, many breweries were compelled to cease business, but Anheuser-Busch, Incorporated, sought to employ its plant, capital and facilities in other industries, including the manufacture of non-alcoholic beverages, ice, ice cream, corn products and yeast (R. 579).

In August, 1918, the Board of Directors of Anheuser-Busch, Incorporated, had ordered the purchase of Bevo cases discontinued (R. 616). Consequent upon the falling off of Bevo sales after 1918, the returns of Bevo cases and bottles exceeded the shipments, and a gradual accumulation of Bevo cases and bottles requiring storage took place (R. 579). The surplus supplies of cases and bottles accumulated in excess of the quantities needed to supply the market for the beverage were stored in unused parts of the Bevo Building, a bottling plant, so far as available, then in other buildings and finally in exposed places (R. 581, 616). A schedule shows the quantities stored at the different types of locations (R. 473). Such accumulation continued until December 31, 1921 (R. 614).[1]

In the years 1920 through 1923 Bevo cases and bottles accumulated were held for use in the marketing of other beverages. Of such other beverages, the production of Ginger Ale was commenced in 1921, of Grape Bouquet and Grape Concentrate in 1922, and of Carcho in 1923 (R. 579). These products were marketed in Bevo cases and bottles (R. 579) and were developed with the hope of making use of such equipment (R. 617).

At the time of the introduction of Ginger Ale, Grape Bouquet, Grape Concentrate and Carcho there was no way

1 Physical "inventory sheets" showed the quantities of equipment from time to time on hand, both before and after the write-offs in controversy, but such inventory sheets were not the basis of any asset account and the figures therein were not entered on the books of account (R. 614-616).

in which the volume of production thereof and the requirements of cases and bottles therefor could be anticipated (R. 579).

Until the end of 1923, because of the reservation of the equipment for the marketing of other products, no effort was made by the management to sell supplies of empty cases and bottles excepting at prices comparing favorably with their costs or in instances where there were supplies of bottles without cases, the cases having been converted into beer cases (R. 579, 616).

In 1923 Anheuser-Busch, Incorporated, was forced by competition to give up using Bevo bottles for the purpose of marketing Ginger Ale and was compelled to adopt a different bottle for that purpose (R. 580).[2]

In 1924, after three years experience in the marketing of Grape Bouquet and Grape Concentrate and two years experience in the marketing of Carcho, the results from these products were disappointing, the total volume of sales of Bevo and of said new products not exceeding 12½% of the peak volume of Bevo sales in 1918 (R. 580). A schedule appended to the supplemental findings contains a summary of all products, and the quantities thereof, moving in Bevo bottles from 1916 to 1933 (R. 620).

After 1924 the company placed on the market several medicinal products, marketed in Bevo bottles, which were not expected to sell in great volume, but no other beverages (R. 617).

Beginning in December, 1923, efforts were made to sell empty Bevo cases and bottles (R. 580). On December 18, 1923, the Directors priced 100,000 Bevo cases and bottles

[2] The use of Bevo bottles for marketing ginger ale was discontinued in the middle part of 1923, the records showing the purchase of 12,000 dozen of green bottles on June 26, 1923 (R. 618).

at $1.00 per case, with its complement of two dozen empty bottles in each, but this price could not be obtained. Thereafter, on April 15, 1924, sale of the same quantity was authorized at 35¢ for each unit of one case and two dozen empty bottles (R. 580, 616-617).

At the end of 1924 the executive officers of the company determined that 749,897 two-dozen, ten-ounce Bevo cases and 3,271,160 dozen Bevo bottles were no longer required for the business of the corporation and that they had in said year become obsolete and had lost their useful value, and directed that the depreciated cost of such cases and bottles, less their remaining junk value, should be charged off on the books of the corporation as of December 31, 1924 (R. 580).

The charge-off made pursuant to such directions (R. 580) was computed as follows (R. 613):

Cost of 749,897 cases at $1.03 each.....		$ 772,393.91
Cost of 3,271,160 doz. 10-oz. bottles.....		885,096.95
Total cost claimed.....		$1,657,490.86[3]
Less:		
Salvage value assigned to cases, 5¢ each.....	$ 37,493.85	
Salvage value assigned to bottles, 5¢ doz.....	163,558.00	
Depreciation accrued on cases during prior years, 10¢ each.	74,987.70	276,039.55
Loss claimed		$1,381,451.31

At the end of 1925, the supply of cases and bottles reserved for use still remaining excessive, the executive offi-

[3] The costs of the cases and bottles were computed from the most recent invoices of purchases. This was based on an inspection revealing that most of the cases had seen little or no use (R. 436). Had average costs of acquisition been used, the cost basis of the cases and bottles would have aggregated $1,440,547.34 (R. 618). The District Court sustained the costs adopted by the taxpayers (R. 581).

cers of the company determined that 409,071 dozen Bevo bottles, in addition to those which were the subject matter of the write-off in 1924, were no longer required for the business of the corporation and that they had in 1925 become obsolete and lost their useful value, and directed that the cost of such bottles, less their remaining junk value, should be charged off on the books of the corporation as of December 31, 1925 (R. 581).

The charge-off which was made pursuant to such directions as of December 31, 1925, was computed as follows (R. 613):

Cost of 409,071 doz. 10-oz. bottles	$119,039.66[4]
Less:	
Salvage value assigned to bottles, 5¢ per doz.	20,453.50
Loss claimed	$ 98,586.16

All of the cases and bottles included in the write-offs were in sound and usable condition at the times they were stored and at the times of the write-offs (R. 581). About 10 per cent of them were new, and about 90 per cent were partly used (R. 581).

There was no way of identifying the used cases as part of any particular acquisitions (R. 616). It was estimated that the cases had made an average of two trips each (R. 618).

The District Court sustained as reasonable the determinations of the officers of the company that the cases and bottles had become obsolete and lost their useful value in the years when written off, after the failure of the products for the marketing of which they were reserved (R.

[4] Had average costs of acquisition been used, the cost basis of the bottles charged off would have been $91,815.99 (R. 618). Cf. note 3.

580, 581); and also sustained the computations of costs, junk values and depreciation[5] (R. 581, 582).

It found that the obsolescence had occurred as claimed (R. 582) and that taxpayers were entitled to deductions from income therefor (R. 583).

The cases and bottles which were the subject matter of the write-offs were in storage at locations where they were not readily accessible to the production facilities of Anheuser-Busch, Incorporated, and could not be used excepting upon incurrence of expense in hauling (R. 582). At the times of the write-offs they were not removed from the various locations where they had been stored, nor were they destroyed, sold or disposed of during 1924 and 1925, and the company continued in the ownership thereof (R. 617). No general instructions were given to the employees of the company to refrain from using the cases and bottles written off, but there was no need for their use (R. 619). There was nothing to prevent the use of the equipment at any time had there been a sudden increased demand for any beverage or product for which they were adapted (R. 619).

None of the cases and bottles included in the write-offs were ever used subsequently in the business of the com-

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[5] In computing the net losses claimed, the company took the position that depreciation on bottles should not be considered in the write-offs. This was on the theory that annual allowances for shrinkage in stocks of bottles were based upon breakage, abrasion and loss in the process of manufacture and in the hands of the trade, and had no relation to bottles in storage which were not subject to such breakage, abrasion and loss. According to expert testimony offered at the trial, the bottles were not subject to physical deterioration through aging or exposure when held in storage. The District Court made findings in conformity with such evidence (R. 582). Depreciation allowances in prior years had been on a per trip basis, varying from 3.4¢ to 5¢ per case shipped, and 1¢ to 2¢ per dozen bottles shipped (R. 618). In the write-offs this gauge was not applied to the bottles which had survived shipment, but was applied to the cases which were depreciated by 10¢ per case upon the assumption that all of the cases had made an average of two trips before they were stored, and that each case depreciated 5¢ in value as a result of each trip (R. 618).

pany excepting to the extent of one carload of bottles used for experimental purposes (R. 582).

The Bevo cases and bottles which were reserved for use at the end of 1924 and at the end of 1925 (exclusive of those which were the subject matters of the write-offs at the end of each of those years) were adequate to accommodate the volume of trade in all products marketed in Bevo bottles (R. 582).

The District Court found from the facts that the cases and bottles were discarded and abandoned at the times when they were written off (R. 582).

The total amount realized from sales of cases and bottles included in the write-offs was $142,123.55, compared with junk values in the aggregate amount of $221,505.35 deducted from their costs at the times of the write-offs (R. 582). The Bevo cases and bottles were not readily salable, because they were specially made and of a size and shape not generally used, and were not marketable excepting in small quantities and at sacrifice prices (R. 583).

The facts touching upon the secondary issues affecting the application of loss carry-overs and computations of overpayments, as found by the District Court, may be summarized as follows:

The charter of Anheuser-Busch, Incorporated (1875), being about to expire on July 7, 1925, the stockholders thereof formed a new corporation, Anheuser-Busch, Incorporated (1925), to which they transferred all of the shares of stock of Anheuser-Busch, Incorporated (1875), and from which they received in exchange therefor shares in Anheuser-Busch, Incorporated (1925), which represented in

the case of each stockholder the same pro rata interest[6] in the new corporation which he or she held in the old corporation (R. 576).

Thereafter, and as of the close of business on June 30, 1925, Anheuser-Busch, Incorporated (1875), whose sole stockholder was then Anheuser-Busch, Incorporated (1925), transferred all of its assets to Anheuser-Busch, Incorporated (1925), by way of a liquidating dividend, and as part of that transaction Anheuser-Busch, Incorporated (1925), assumed all of the liabilities of Anheuser-Busch, Incorporated (1875) (R. 576-7).

Anheuser-Busch, Incorporated (1925), at the commencement of business on July 1, 1925, had the same assets, the same liabilities and the same invested capital as Anheuser-Busch, Incorporated (1875), had had at the close of its business on June 30, 1925, and from and after July 1, 1925, Anheuser-Busch, Incorporated (1925), continued the business of Anheuser-Busch, Incorporated (1875), with the same officers and directors, at the same location and with the same facilities (R. 577).

The purpose of the formation by said stockholders of said 1925 corporation was to continue the business of the old corporation, and such formation was necessitated by the fact that the charter of the old corporation was about to expire and the laws of Missouri did not permit the extension of such charter for a further period of time, although such laws did, by permitting the stockholders of an expiring corporation to organize a new corporation of the same name to continue the business of the old corporation, point the way for reincorporation (R. 577).

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6 The actual numbers of shares transferred were not identical with the numbers of shares received, the old corporation's capital stock having been divided into 480 shares and the new corporation's into 180,000 (R. 612).

The District Court found from the facts that the effect of the reincorporation was the same as if the charter of the old corporation had been extended and that the two corporations were identical in fact and were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924 (R. 577).

The History of the Controversy.

On the consolidated income tax return of Anheuser-Busch, Incorporated, and affiliates for the year 1924, a net loss of $816,105.95 was reported for the affiliated group after deduction of the obsolescence loss of $1,381,451.31. Although the consolidated income tax returns for 1925 and 1926 reported net incomes for each year, no tax liability was shown in either return for the reason that operating losses of prior years were claimed as deductions in amounts sufficient to offset the incomes reported (R. 612-III).

In deficiency letters dated October 15, 1930, the Commissioner of Internal Revenue disallowed the deductions on account of obsolescence or loss of useful value, and, pursuant to such deficiency letters, there were assessed taxes for 1924, 1925 and 1926 which, together with interest, aggregated $186,277.18, divided into fifteen tax bills representing apportionments of such taxes for the different years to and among Anheuser-Busch, Incorporated, and the various other affiliated corporations (R. 574, 575, 597).

On January 22, 1931, Anheuser-Busch, Incorporated, paid all of these tax bills (R. 575).

On January 19, 1933, claims for refund were filed by or on behalf of the various affiliated corporations, which were found by the District Court to set forth grounds fully supporting its judgments (R. 575, 576). On April 19, 1934, the claims for refund were disallowed (R. 576).

On April 17, 1936, suits to recover overpayments of income taxes assessed and collected as above stated were filed, such suits corresponding respectively to the several tax bills rendered by the Collector pursuant to the deficiency letters of October 15, 1930 (R. 576).

On June 13, 14 and 15, 1939, the cases were tried by the District Court without a jury, jury being waived (R. 573).

On March 7, 1940, the District Court entered its Findings of Facts, Conclusions of Law, and Directions for Judgments (R. 573-593). It held that Anheuser-Busch, Incorporated, was entitled, both under subsection (a) (7) of Section 234 of the Revenue Act of 1924 and under subsection (a) (4) of Section 234 of the Revenue Act of 1924, to the deductions of $1,381,451.31 in 1924 and $98,586.16 in 1925, on account of obsolescence or loss of useful value of Bevo cases and bottles. The judgments were computed upon the theory that the net loss resulting from the allowance in 1924 might be offset against the income of Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), for the year 1925, and against the income of Anheuser-Busch, Incorporated (1925), for the year 1926, but not against the incomes of their subsidiaries in 1925 and 1926. Judgments were accordingly rendered in favor of taxpayers for the aggregate amount of $123,179.46 (R. 587, 590-92).

From such judgments the Collector appealed. Cross appeals were taken by the petitioners so as to protect their rights to judgments in the amount of $145,802.65 in the event that it should be determined that the District Court erred in treating Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), as the same taxpayer for the purpose of loss carry-overs, claiming that upon the theory that the two corporations were separate taxpayers, petitioners were entitled to the recovery of the larger aggregate amount (R. 18-19).

OPINIONS AND RULINGS BELOW.

The United States District Court for the Eastern Division of the Eastern Judicial District of Missouri did not render an opinion, but entered on March 7, 1940, its Findings of Facts, Conclusions of Law and Directions for Judgments (R. 573-593), and on April 2, 1940, its Amended and Additional Findings of Fact (R. 611-619). It held that petitioners were entitled, under subsections (a) (7) and (a) (4) of Section 234 of the Revenue Act of 1924 to deductions in the amount of $1,381,451.31 for 1924 and in the amount of $98,586.16 for 1925 on account of obsolescence or loss of useful value of Bevo cases and bottles, and rendered judgments for the recovery of $123,179.46 overpayments of income taxes for 1924, 1925 and 1926, computed upon the theory that Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 1128-1161) rendered on May 29, 1941, is reported as *Becker, Collector of Internal Revenue, v. Anheuser-Busch, Inc.*, 120 F. (2d) 403. It held that petitioners were not entitled to the deductions either under subsection (a) 7, on account of obsolescence, or under subsection (a) 4, on account of loss of useful value of the equipment, and ordered that the judgments of the District Court in favor of the plaintiffs be reversed with directions to dismiss the petitions, and that the judgments of the District Court against the plaintiffs be affirmed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals, in holding that deductions in the taxable years for obsolescence of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) (7) of the Revenue Act of 1924, so far disregarded the facts of record in this case as to require exercise of this Court's power of supervision, in that it failed completely in its opinion to consider or advert to the essential facts determined by the District Court concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to utilize the Bevo cases and bottles in controversy through the marketing of new products then being developed, and overlooked the argument of petitioners that the accrual of obsolescence was thereby retarded until the advent of the taxable years, when such new products became demonstrated failures.

II.

The Circuit Court of Appeals, in holding that the loss of usefulness of the equipment here in controversy was not functional and did not arise from external causes (and was therefore not within the definition of obsolescence set forth in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13), has so far disregarded the facts of record in this case as to require exercise of this court's power of supervision, in that under the undisputed facts of record in the case as found by the District Court the loss of usefulness of the equipment was caused by the introduction of de-alcoholized near-beer under changed governmental regulations—a wholly external cause not within the control of the taxpayers.

III.

The Circuit Court of Appeals, in holding that Section 234 (a) (7) of the Revenue Act of 1924 authorized only annual deductions, similar to depreciation deductions, over a period of years measuring the useful life of an asset, rendered a decision in conflict with decisions of this court in:

United States Cartridge Company v. United States, 284 U. S. 511;
Gambrinus Brewery Co. v. Anderson, 282 U. S. 638;
Burnet v. National Industrial Alcohol Company, Inc., 282 U. S. 646;
Burnet v. Niagara Falls Brewing Company, 282 U. S. 648.

IV.

The Circuit Court of Appeals, in considering abandonment or discarding of an asset as a prerequisite to an obsolescence deduction, rendered a decision in conflict with decisions of this court in:

United States Cartridge Company v. United States, 284 U. S. 511;
Gambrinus Brewery Co. v. Anderson, 282 U. S. 638;
Burnet v. National Industrial Alcohol Company, Inc., 282 U. S. 646;
Burnet v. Niagara Falls Brewing Company, 282 U. S. 648.

V.

The Circuit Court of Appeals, in holding that deductions in the taxable years for loss of useful value of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) (4) of the Revenue Act of 1924, because usefulness of the equipment had terminated long before the tax years and there was no sudden termination of usefulness in the tax years, so far disregarded the facts of record in this case as to require exercise of this court's

power of supervision, in that under the undisputed facts of record in this case, as determined by the District Court, the equipment was being held in prior years for the marketing of new products then being developed, and termination of usefulness was perforce postponed until such products were demonstrated failures.

VI.

The Circuit Court of Appeals, in holding that abandonment or discarding of an asset [within the meaning of the regulations under Section 234 (a) (4) of the Revenue Act of 1924 relating to loss of useful value] implied relinquishment of ownership and possession through sale or destruction, rendered a decision in conflict with the decisions of other Circuit Courts of Appeal in:

Wheeling Tile Company v. Commissioner, 25 F. (2d) 455;
Liberty Baking Company v. Heiner, 37 F. (2d) 703;
United States v. Hardy, 74 F. (2d) 841;

and probably in conflict with the decision of this court in:

United States v. S. S. White Dental Manufacturing Company, 274 U. S. 398, 402.

PRAYER.

For the purpose of correcting the errors complained of and to the end that the rights of petitioners may be determined in accordance with the law, your petitioners respectfully pray: that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it to certify and send to this court on a day certain to be therein designated a full and complete transcript of the records and proceedings of said Circuit Court of Appeals in the above-described causes (being docket numbers 11,-

816 to 11,836, both inclusive, on the docket of said court), to the end that the decision and judgment of said Circuit Court of Appeals in said causes may be reviewed by this Honorable Court as provided by law; that said decision and judgment be so reviewed by this court, and that your petitioners may have such other and further relief as to this court may seem appropriate.

ANHEUSER-BUSCH, INCORPORATED,

WILLIAM L. PARKER, Receiver of and for Anheuser-Busch Ice and Cold Storage Company, Incorporated, a corporation formerly existing under the laws of the State of Virginia,

MELROSE ICE CREAM CORPORATION, a corporation formerly existing under the laws of the State of New York,

ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER, and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors, and Trustees for the Creditors and Stockholders, of said Melrose Ice Cream Corporation,

C. D. RUSSELL, Liquidator of Anheuser-Busch Ice Cream and Beverage Company, a corporation formerly existing under the laws of the State of Louisiana,

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, Surviving Members of the Last Board of Directors, and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the Laws of the State of Oklahoma, and

SPRINGFIELD ICE AND REFRIGERATING COMPANY,

By

DANIEL N. KIRBY,
HARRY W. KROEGER,
Attorneys for Petitioners.